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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No..... ....

CHARLES E. DABOLL, Jr., and
OPERATIVE PLASTERERS' AND CEMENT
MASONS' INTERNATIONAL ASSOCIATION, AFL,
LOCAL UNION 797,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

YOUR PETITIONER RESPECTFULLY SHOWS:

1. OFFICIAL REPORT OF THE OPINIONS BELOW:

The decision and order of the National Labor Relations Board appears in the record herein at page 44.

A copy of the decision of the United States Court of Appeals for the Ninth Circuit entitled National Labor

Relations Board vs. Charles E. Daboll, Jr., and Operative Plasterers' and Cement Masons' International Association. AFL, Local Union 797, No. 14,071, dated September 17, 1954, is attached hereto marked, Appendix "A". Rehearing was denied October 12, 1954.

2. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed which was entered by the Ninth Circuit Court of Appeals was September 17, 1954; rehearing denied October 12, 1954.

The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28 U. S. C. 1254-1.

3. THE QUESTIONS PRESENTED FOR REVIEW ARE:

(1) The Board did not have jurisdiction in this case, because of prior decisions of said Board defining by certain yardsticks the minimum limits upon which jurisdiction would be exercised which authorities respondents had a right to rely upon and in addition thereto because of the rule of de minimus non curat lex.

(2) The contract governing relations between Petitioners herein was executed and remained in existence ever since the year 1946, with changes only of wage rates; and hence alleged unfair practices were immune from Labor Management Act of 1947, pursuant to Section 102 of the Act.

(3) There was no substantial evidence sufficient to justify findings of unfair labor practices.

4. THE STATUTES INVOLVED:

The following sections of the Labor Management Relations Act of 1947, are involved herein, namely:

Title 29 USCA 152 (6) (7)

Definitions. — When used in this Act (151 et seq. of this title) —

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Title 29 USCA 157

Rights of employees. — Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3) (158 (a) (3) of this title). (July 5, 1935, c. 372, 7, 49 Stat. 452; June 23, 1947, c. 120 Title 1, 101 in part, 61 Stat. 140.)

Title 29 USCA 158 (a) (1)

Unfair labor practices. — (a) It shall be an unfair labor practice for an employer — —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157 of this title);

Title 29 USCA 158 (a) (3)

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act (151 et. seq. of this title), or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act (this subsection) as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organi-

zation is the representative of the employees as provided in section 9 (a) (159 (a) of this title) in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h) (159 (f), (g), (h) of this title) and (ii) unless following an election held as provided in section 9 (e) (159 (e) of this title) within one year preceding the effective date of such agreement, the board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Title 29 USCA 158 (b) (1)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 (157 of this title): Provided, That this paragraph shall not

impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein: or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;

Title 29 USCA 159 (b) (2)

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

5. SUMMARY STATEMENT OF THE MATTER INVOLVED

The National Labor Relations Board, after proceedings regularly had, found Petitioners herein guilty of unfair labor practices. Daboll is a plastering contractor who purchases lath and plaster, and recruits and supervises the workmen who do the plastering. During that part of 1952 preceding August 15, 1952, Daboll received cash from work done within the State of California the sum of $27,484.42; the record does not disclose the period wherein such work was done but only the cash receipts for that portion of 1952; in the year 1952, after August 15, 1952, Daboll moved to the State of Nevada and became a permanent resident therein; he received the sum of $323,000.00 for work

done in Nevada for the period August 15, 1952 to the end of the year.

On or about March 10, 1952, Clarence Sells and Wesley Sinclair, two colored plasterers belonging to a California local, deposited their travel cards with Respondent Union and applied for work; they were placed at the bottom of the waiting list of unemployed plasterers at the union office.

On or about March 10, 1952 said plasterers proceeded to Henderson, Nevada, and applied for work through Mr. Longstreet, Daboll's foreman; according to their testimony they were told men were needed but clearances from the union had to be first obtained; they further testified the union refused to clear them. However, the union officials testified that there were others ahead of them and no request had been made for either Sells or Sinclair from the contractor.

6. BASIS FOR FEDERAL JURISDICTION IN FIRST INSTANCE

This action was instituted by Respondent National Labor Relations Board against Petitioners herein, Charles E. Daboll, Jr., and Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797 pursuant to provisions of Labor Management Relations Act of 1947, 29 USCA 160.

7. ARGUMENT

The Respondent Daboll testified (R 362 et seq) as to the amount of business transacted by him in 1952, as follows:

	RECEIPTS	
(R 371)	In California	$27,484.42
(Idem)	In Nevada (Federal Homes)	323,000.00
(R393/394)	In Nevada (Royce Peterson)	2,400.00

PURCHASES

(R391)	In California (Used in California From Atwater Co., Los Angeles	11,816.00
	California, used in Nevada	132,518.00
(R423/424)	Portion of such purchases manufactured and delivered in Nevada. Not Interstate Commerce	55,000.00
	Actual amount of purchases, purchased and shipped from outside Nevada to Nevada during 1952	$ 77,518.00

The $27,484.42, above referred to, according to the testimony of Daboll (R.371) only included cash receipts; there is no testimony or proof as to the year wherein the work was done to earn such receipts.

One of the criteria used by the examiner, affirmed by the Board and the Ninth Circuit Court of Appeals, was that established in the case of Stanislaus Implement and Hardware Co., 91 NLRB 618, which case held that the Board would assume jurisdiction in cases of enterprises producing or handling goods for out-of-state shipment, or performing services outside of the state in which the firm is located, valued at $25,000 a year.

From the record herein it cannot be determined whether the said $27,484.42 was for services rendered in 1952 or for services rendered in a prior year.

The other criteria used by the examiner, affirmed by the Board and the Ninth Circuit Court of Appeals, was that established in the case of the Borden Co., 91 NLRB 628.

> "The Borden Company processes and distributes milk and milk products throughout the United States. The present proceedings involved only its Houston, Texas, plant, which is under the supervision of its Southern Division. During the first six months of 1950, the Houston plant purchased milk and supplies valued at approximately $4,000,000, of which about $120,000 represents supplies shipped to the plant from sources outside the State of Texas. All sales were made locally."

> "We find that the employer is engaged in commerce within the meaning of the Act. Having recently re-examined Board policy covering the exercise of jurisdiction, we continue to believe that when a plant is owned and operated by a company which is a multi-state enterprise, we should exercise our jurisdiction in favor of taking jurisdiction, even though management is entrusted to local officials and the particular plant may sell its entire product within the state where it is located, Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction over the Houston Plant of the Borden Company."

Certainly the instant case cannot be compared with a case like Borden Co., wherein millions of dollars in

business is conducted in many states while Daboll is a small plastering contractor having receipts of $27,-484.42, in California in 1952, then leaving California entirely and establishing an entirely new venture, consisting of his entire operations in Nevada, with total business in Nevada in the sum of $323,000.00

The Ninth Circuit held that because the Borden case did not specify the number of states in which operations must be conducted, (R 424) the assumption of jurisdiction in the instant case involving only two states was not unreasonable.

Said Court failed to follow Petitioners' argument wherein it was contended that Respondents had the right to rely on prior decisions of the Board as to when they would assume jurisdiction in certain cases, and in effect held it would make no difference, even if this case failed to come within the established criteria of the Board.

The Eighth Circuit refused to rule with the Board upon that point in the case of National Labor Relations Board, Petitioner, vs. National Gas Company, Respondent, decided August 10, 1954, Case No. 14,739, 54 ALC 1407, wherein the court at page 1409 ALC, said:

> "The Board, it seems to us, is in the untenable position of asking this court to proceed in a case in which it has precluded itself from proceeding, both by express decision and by the adoption and promulgation of self-limiting rules. An order of enforcement, if granted by this court, would require further action on the part of the Board and respondent em-

ployer. But the Board, under its decision that its new regulations shall apply to pending as well as future cases, has specifically denied its jurisdiction over respondent and others similarly situated. It could not consistently with the rules it has adopted and published, exert its powers to effectuate an enforcement order of this court against the respondent. Such an order and any action of the Board in respect to it would present an arbitrary and capricious discrimination against respondent."

In prior decisions of the Board jurisdiction was declined by the Board in operations similar to Petitioner contract herein, in the following cases:

Tampa Sand & Material Co., 78 NLRB 74 (1948);
Richter Transfer Co., 80 NLRB 186 (1948);
Knoxville Sandgravel Material Co., Inc.,
80 NLRB 227 (1948).

THE CONTRACT GOVERNING RELATIONS BETWEEN PETITIONERS HEREIN WAS ADOPTED, RATIFIED, APPROVED AND CONFIRMED IN 1946 AND HAS NEVER BEEN CHANGED EXCEPT AS TO WAGE RATES.

Jerry Berry, the business agent of Petitioner Union, testified contract had been in use since 1946 without change except as to wage rates. (R. 120) (R. 122) (R. 282).

Pursuant to Sec. 102 of the Act, the agreement herein was not an illegal agreement, and Petitioners were immune from enforcement of alleged unfair labor practices under the Act.

National Labor Relations Board vs. Clara-Val Packing Co. 191 Fed. (2d) 556 CCA (9th).

National Labor Relations Board vs. International Assn. of Heat & Frost Insulator & Asbestos Workers Local No. 7 AFL. 199 F 2d 321.

THERE WAS NO SUBSTANTIAL EVIDENCE UPON WHICH THE FINDINGS OF UNFAIR LABOR PRACTICES COULD BE LEGALLY JUSTIFIED.

Petitioner contractor Daboll testified that Fred Longstreet was his foreman; (R. 81) that on or about March 10, 1952, Sells and Sinclair, complainants herein, went to Petitioner contractor's job in Henderson (R. 168-170) and asked Longstreet for a job; (R. 170-171) and were told by Longstreet that all men were hired through the union and referred them to the union business agent.

Sells and Sinclair further testified (R. 182) that they met Daboll in Las Vegas about April 29, 1952, whereupon they told Daboll they had filed charges against the union and Daboll; (R. 184) whereupon Daboll purportedly said that he would have given them a job if he could but up here in Las Vegas he couldn't do it. (R. 184) That in Los Angeles he worked half colored and half whites; Sells and Sinclair were both colored men.

Mr. Daboll (R. 267) explaining the aforesaid conversation, testified as follows:

"Basically the conversation and their request upstairs, and Mr. Sells and Mr. Sinclair, to say in one

word is this; that Mr. Sells and Mr. Sinclair were desiring to work in Las Vegas on the Henderson job. I told them that the job was being run by Mr. Fred Longstreet, and that he was the man who was required to hire a man on the job. They pointed out that they had not been hired. They themselves brought on the subject of discrimination based on their color. They said to me that they had reason to believe that they could prefer charges against me and the union for discriminating against them because of their color. I pointed out the unfortunate position that I am in, I must be friends and get along with the men that are available for employment in Las Vegas, Nevada; I have no reason to discriminate against anyone for any reason whatsoever. I offered proof that I had approximately 350 employees in Los Angeles at one time or another the year previously, of which 100 were Negroes."

Mr. Daboll further testified (R. 269) that he had no trouble in obtaining any particular man from the union when requested; that he preferred to have local men as a matter of policy.

While the trial examiner allowed the general counsel the widest possible latitude in introducing evidence, a considerable amount of which was hearsay, and admitted over objection, the testimony of Longstreet, a key witness, was ruled out; however, the offer of proof is as follows:

(R. 271) Mr. Longstreet, this witness would have testified that at the conversation with Mr. Longstreet, Mr. Longstreet stated to him that Mr. Sells and Mr. Sinclair had applied for work, but that he had never at

any time requested the union to send these men out on that particular job; and further that he would have said that he was satisfied to obtain the local men as had been the custom through the local union office, and that he had received any men which he had requested.

In view of the examiner's latitude extended to the general counsel and the summary nature of the hearing, it was error to refuse to admit this testimony.

A careful analysis of all the evidence herein discloses a situation wherein an employer had made satisfactory arrangements with the local union for the clearance of personnel which was mutually agreeable to all concerned and two unknown workmen appeared upon the scene of the Petitioner contractor's job rustling work; that said workmen were from California and had deposited travel cards according to union rule and were placed on waiting list; Petitioner contractor never at any time expressed a desire to, nor entered into any agreement to employ said men; no request was made for them through the union.

Petitioners could not possibly come within the provision of Section 8(a) or 8(b) (1 or 3) because both Sells and Sinclair were already members of Petitioner union and there is no evidence tending to show that membership in a labor organization was either encouraged or discouraged by either Petitioner.

In the case of National Labor Relations Board, Petitioner vs. Thomas Rigging Company, and the Carpenters Union, Local No. 642, United Brotherhood of Carpenters and Joiners of America, AFL, and Harry

Cecil, Business Agent of Respondent Union, Respondents, decided March 10, 1954, 211 Fed. (2d) 153, held that the Respondent Millwrights Union could properly refuse to issue clearances to any person not a member of the said union. The testimony in this case clearly shows that neither Sells nor Sinclair, the complainants herein, were members of Petitioner Union herein but were members of a California Local. This being the case, the entire theory of Respondent is based upon the refusal of Petitioner Union to give clearances, hence the order should not be enforced against the Petitioner Union, but only against the Petitioner Employer, if at all.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Ninth Circuit Court of Appeals in the case numbered and entitled on its Docket No. 14,071, National Labor Relations Board, Petitioner, vs. Charles E. Daboll, Jr., and Operative Plasterers' and Cement Masons' International Association, AFL, Local Union 797, Respondents.

DATED: November 10, 1954

BONNER & RITTENHOUSE
By John W. Bonner
Of Counsel for Petitioners
319 Fremont Street
Las Vegas, Nevada

TOY R. GREGORY
Attorney for Petitioners
Las Vegas, Nevada

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

vs.

Petitioner,

CHARLES E. DABOLL, JR., and OPERATIVE PLASTERERS' and CEMENT MASONS' INTERNATIONAL ASSOCIATION, A.F.L., LOCAL UNION NO. 797,

Respondents.

No. 14,071

Sep. 17, 1954

Petition for Enforcement of Order of the National Labor Relations Board.

Before: DENMAN, Chief Judge; and
BONE and ORR, Circuit Judges.

ORR, Circuit Judge:

The National Labor Relations Board, after proceedings regularly had, found respondent Daboll and respondent Union guilty of unfair labor practices. Daboll is a plastering contractor who purchases lath and plaster, and recruits and supervises the workmen who do the plastering. During that part of 1952 preceding August 15th, the period during which the alleged unfair labor practices occurred, Daboll did work in California for which he was paid $27,484.42, and work in Nevada for which he was paid $323,000.00. The Board determined to exercise jurisdiction on the basis of a finding that Daboll was conducting a multi-state enterprise. This exercise of jurisdiction is challenged by respondents as unreasonable.

In making its determination to exercise jurisdiction the Board applied two tests. It found that the employer's operations affected

commerce within the meaning of the National Labor Relations Act. It concluded that jurisdiction should be exercised because the case came within the terms of the self-imposed rules which the Board has set up to govern the exercise of its jurisdiction.

Daboll imported materials valued at approximately $77,000 into Nevada during 1952. Respondents contend that the statutory grant of jurisdiction over unfair labor practices "affecting commerce" is subject to the rule of de minimis, and that imports worth $77,000 fall within that rule. We do not agree. N.L.R.B. v. Stoller, 9 Cir. 1953, 207 F.2d 305. The Board declines jurisdiction when in its opinion commerce is affected only by way of a direct inflow of goods and such inflow is less than $500,000. Federal Dairy, Inc., 1950, 91 N.L.R.B. 638. However, this self-imposed rule is not jurisdictional. The Board may properly exercise jurisdiction on grounds other than the direct inflow of goods.

The determination of when jurisdiction shall be exercised rests within the discretion of the Board. The courts will not disturb that discretion unless the Board has acted in violation of previously prescribed standards upon which the employer had a right to rely, and the disregard of which would lead to an injustice. We do not think such a result is present here. The Board had previously fixed as a yardstick for the exercise of jurisdiction the existence of a multi-state enterprise. The Borden Company, 1950, 91 N.L.R.B. 628. It is true that in cases where such a basis for the exercise of jurisdiction has been relied on operations in many states have been involved, for example, Arthur G. McKee & Co., 1951, 94 N.L.R.B. 399. In the instant case operations were conducted in two states only. However, in setting up the standard of a multi-state enterprise as a basis for the assertion of jurisdiction the Board made no specific declaration as to the number of states in which operations must be conducted. In the instant case they have said that two are sufficient. We cannot say that this ruling is unreasonable.

The Board found that respondent Daboll had violated § 8(a) (1) and (3) of the National Labor Relations Act, and that respondent Union had violated §8(b) (1) (A) and (2). Sometime in the month of January of 1952, the respondents entered into a collective bargaining agreement which was in force and effect on March 10, 1952, the date of the alleged unfair labor practices. The Board found the contract to be an illegal union security agreement.

Respondents contend that the contract and action taken by them pursuant thereto are protected by § 102 of the Labor Management Relations Act, 1947, which provides, in part:

" . . . the provisions of section 8(a) (3) and section 8(b) (2) of the National Labor Relations Act . . . shall not make an unfair labor practice the performance of any obligation under a collective bargaining agreement entered into prior to the date of the enactment of the Act, . . . unless such agreement was renewed or extended subsequent thereto."

Respondents attempted to establish that the contract which Daboll agreed to adopt on or about January 1, 1952, and which bore the date of January 1, 1951, had been in effect without change except as to wages since 1946. The terms of the January 1, 1951, contract were adopted by the respondents in an independent agreement which became the contract of the parties as of that date. It could have no such retroactive effect as to bring it within the protection of § 102.

By the terms of the agreement Daboll undertook to "require that all plasterers on the job shall be members in good standing of this Local Union," while the local union on its part agreed to furnish competent men. The agreement further provided that, "should an occasion arise wherein the Local Union is unable to furnish requested men within forty-eight hours after said requisition is placed, the employer shall be free to request men himself through other Local Unions, provided that the men have clearances from Local No. 797 before going to work."

On or about March 10, 1952, Clarence Sells and Wesley Sinclair were denied employment pursuant to the terms of this agreement in that, although members of another local, they had not and could not obtain a clearance from Local 797. The Board's determination that this action was pursuant to the terms of an illegal union security agreement which violated § 8(a) (3) of the Act is clearly correct. The action taken tended to encourage membership in Local 797 on the part of Sells and Sinclair, and in any event the enforcement of an agreement of the character existing between respondents violated § 8(a) (3). Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17.

It is ordered that a decree be entered enforcing the order of the Board.

(Endorsed:) Opinion. Filed Sep. 17, 1954. Paul P. O'Brien, Clerk.